

Case Number: 2009-0320

[REDACTED] vs. [REDACTED]
Hearing Officer: Joseph P. Selbka

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

AUG 17 2009

Impartial Due Process Hearing Decision Cover Page

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District Name [REDACTED] Phone: 8159663101
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Parent Name [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Date and Timelines

Date of Written Request: 02/25/2009
Date of Pre-hearing Conf: 04/15/2009

Date of Hearing: 07/16/2009 to 7/22/2009
12:00:00 AM
Date of Decision: 8/13/2009

Summary of Decision

The District denied Student with ADHD eligibility because Student did not demonstrate a severe discrepancy between academic achievement and cognitive ability. The District filed for due process claiming their evaluation was appropriate. The Parent filed a cross complaint requesting a finding of eligibility and reimbursement. IHO found for the parent on eligibility and found the evaluation was not appropriate.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2009-0320
)
) Joseph P. Selbka
) Impartial Due Process
) Hearing Officer

HEARING DECISION, OPINION AND ORDER

TO: Ms. Mary Long
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

[REDACTED]

[REDACTED]

This matter comes before us pursuant to the hearing request of [REDACTED] "School District" or "District", against ("Student's Parent"), on behalf of her son, [REDACTED] ("Student") Student's Parent has filed a counter-complaint requesting that Student be found eligible for special education and for compensatory education for the District's alleged failure to timely find Student eligible for special education. The School District is represented by [REDACTED] Student's Parent is represented by [REDACTED] The parties have agreed to extend the forty-five day deadline for hearing to allow for written closing statements to be provided by August 3, 2009, and for an ultimate decision by August 13, 2009. There were five days of testimony- June 19, 2009, June 24, 2009, June 25, 2009, July 16, 2009, and July 22, 2009. We have jurisdiction to hear this matter pursuant to 105 ILCS 5/14-8.02(a) *et seq.* and 23 Ill.Admin.Code 226.000 *et seq.*

I. Procedural History

The School District filed a due process hearing complaint, through its attorney, on February 25, 2009, who has represented the District throughout the hearing. The Parent filed a counter due process complaint on April 2, 2009. A prehearing conference occurred on April 7, 2009.

The hearing occurred in [REDACTED] at the Parents' attorneys' offices on June 19, 24, and 25, 2009; and on July 16 and 22, 2009. The District Due Process Complaint claims that the evaluations provided by the District are appropriate. The Parent has responded by arguing that the evaluations conducted by the District were inappropriate. The Parent has further made a counter-due process complaint claiming that the District

should have found Student eligible for special education. The Parent also has made a request for compensatory education and reimbursement of private education and counseling expenses for costs incurred in order to make up for the District's alleged lack of provision of special education for Student.

II. Issues Identified and Remedies Requested

1) Whether the District failed to conduct an appropriate evaluation (during Student's initial preplacement evaluation) of Student as required by IDEA. In making that determination, we must determine:

(a) Whether the District violated IDEA by failing to conduct an occupational therapy evaluation;

(b) Whether the District violated IDEA by failing to conduct an evaluation in regard to social/emotional and behavioral issues.

(c) Whether the District violated IDEA by failing to conduct an assistive technology evaluation;

(d) Whether the District's medical evaluation was appropriate;

(e) Whether the District failed to assess Student in regard to suspected disabilities, to wit: depression, possible bipolar disorder, and other emotional disabilities;

(f) Whether Student's Mother should be reimbursed for the independent evaluation she procured for this hearing.

2) Whether the District violated IDEA by failing to find Student eligible for special education under the IDEA disability terms of: (a) specific learning disability; (b) emotional disturbance; and/or (c) other health impaired.

3) If Student should have been found eligible for special education, then we must also determine the following:

(a) Whether Student is entitled to compensatory education from the District due to the District's failure to find Student eligible;

(b) Whether Student's Parent is entitled to reimbursement for counseling and tutoring services to replace the loss of special education;

(c) Whether we should, as a remedy, determine a special education placement for Student.

III. Findings of Fact

Fact's Leading up to Student's Special Education Evaluation by the District

1. Student is a Seventh Grader as [REDACTED] one of the District's schools.

2. In or around October, 2006, Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD") (6/19-Tr.

186-187). The District became aware of Student's ADHD diagnosis since at least late January, 2008 (J025).

3. Student's Mother requested a case study evaluation and 504 Plan on December 13, 2007 (J111). On February 4, 2008, Student's social worker, [REDACTED] again requested an evaluation under Section 504 (the Rehabilitation Act) ("Section 504 Evaluation") (J024-J027). The request for a Section 504 Evaluation stated that Student was diagnosed with ADHD and ODD (J024). [REDACTED] also noted in the request that Student was socially and emotionally delayed (J025).

4. The Section 504 evaluation was conducted, and two of Student's teachers noted that Student had to be refocused in class; had problems completing work on time; and had problems interacting with peers (J032).

5. The 504 Accommodation Plan took effect on April 10, 2008 (J037). Student was to be given preferential seating; allowed additional time; to use cooperative learning; and there was to be home-school communication; daily/weekly progress reports; and immediate reinforcement (J033-J034).

Student's Academic History

6. [REDACTED] testified on behalf of the District. [REDACTED] was Student's science teacher in the Seventh Grade (6/19-Tr. 26-27). [REDACTED] testified that Student has average academic ability and socialized with other students in a similar manner as average students (6/19-Tr. 27, 28-29, 30). Student received a D in LJ's class for the first semester; a C in the Third Quarter, and a D in the Fourth Quarter (6/19-Tr. 41, 44, J072, D029).

7. Part of [REDACTED] science class consisted of completing packets consisting of reading, answering questions and completing a quiz (6/19-Tr. 43). In discussing Student's progress [REDACTED] claimed Student received an "A+" overall for completing packets over the course of the year and much higher grades as to quality of work in the latter half of the year (6/19-Tr. 85-87). [REDACTED] later admitted that those were not grades assessing the quality of the work, but a grade for simply completing all the packets regardless of quality (6/19-Tr. 85-87). There were approximately 24 packets over the course of the year (6/19-Tr. 87). Student's progress report indicates that on the first six packets, Student obtained three B's; two D's and an F (D024). [REDACTED] claims that Student's grades rose in later packets, but the later grades were never submitted into evidence. [REDACTED] another teacher, admitted Student's grades can reflect many things depending on the class (6/24-Tr. 104).

8. Curriculum based assessments in science show that, in at least one tested area, Student's academic performance relative to his grade level declined from "exceeds standards" to "below standards" (J 064, 6/19-Tr. 49-51).

9. [REDACTED] was Student's teacher for [REDACTED] and part of [REDACTED] [REDACTED] and [REDACTED] are remedial reading programs focused on bringing students reading levels up to their peers (6/24-Tr. 55).

10. [REDACTED] estimates Student's reading level to be at about Sixth Grade Level (6/24-Tr. 46). [REDACTED] testified that Student was passing [REDACTED] and may have progressed a few months in ability since coming into [REDACTED] class (6/24-Tr. 55).

11. [REDACTED] is a special education teacher for the District in language arts (6/24-Tr. 86) who taught Student for his [REDACTED] class in Sixth Grade and part of Seventh Grade. Student received passing grades from [REDACTED] and grasped the concepts of [REDACTED] (6/24-Tr. 89-90).

12. Between November 30, 2007, and May 28, 2009, Student has taken seven SRI reading tests (J060, J061, 6/24 Tr. 96-97). All of the tests show that Student's reading is far below grade level (J060-J061). The May, 2009, exams show a sharp decline in scores, indicating that Student was reading at a second grade reading level (J060-061). In Sixth Grade, [REDACTED] believed the test scores accurately reflected Student's reading ability (6/24-Tr. 99). [REDACTED] categorically denied that Student was intentionally failing the norm based assessments in Sixth Grade (6/24-Tr. 99). Student did score better on the Spring, 2008, ISAT, another norm based assessment, and barely met standards on that test (J054). [REDACTED] explanation for the disparate scores was that Student does better on some days than others (6/24-Tr. 103).

[REDACTED] on the other hand, believes that Student was intentionally failing the SRI tests, but the ISAT reading tests better reflect Student's abilities (6/24-Tr. 43). [REDACTED] admitted she does not know if Student's scores are a result of ADHD or not (6/24-Tr. 51). [REDACTED] admitted Student's ISAT lexile score for Sixth Grade showed that he was reading at a fifth grade level (J055, J060).

13. In Seventh Grade, Student was tested three times in reading using the Discovery Education Assessment (J063). On two of the three tests, Student scored "Below Standards" by the end of the year in every category which the Discovery Education Assessment tests (J063). On one test, Student scored "Below Standards" on three of the six tested categories (J063).

14. Student's Math and English were taught by [REDACTED] (D036-D041). Although [REDACTED] was on the District's witness list, she did not testify at the hearing. For the first three quarters of Seventh Grade, Student failed both of [REDACTED] classes (D036-D041; P104-106). The District provided no reason why [REDACTED] did not testify at the hearing. Student did average a high D or low C in social studies in the first three quarters of Seventh Grade (D104-D106). [REDACTED] [REDACTED] taught social studies and also did not testify at the hearing. The only teacher who taught Student a class at his grade level and testified at the hearing was [REDACTED]

15. The Discovery Education Assessment for math for Seventh Grade scored Student at "Below Standards" (J065). Student's grade level relative to his peers declined over the course of Seventh Grade in math (7/16- Tr. 232). The ISAT 2008 Math test scored Student as "Below Standards" (J054).

16. Student's 2008 ISAT score in writing scored Student as "Below Standards" (J058).

17. From fourth grade to seventh grade, Student was given norm based assessments and curriculum based assessments. These assessments show Student scoring at "Below Standards" on most such assessments (although Student does occasionally score a "Meets Standards" on a few tests over the course of several years). (P26-P35).

18. Some of Student's problems arise from not completing homework, however, he also often received failing grades on classroom assignments, tests and quizzes (D022, D024, D029, D036-D041; 6/24-Tr. 48-49).

19. In the first semester of Seventh Grade, Student received two D's; Two F's and a C in his Seventh Grade academic subjects (not taking into account remedial reading and PE) (P105). In the third quarter of Seventh Grade, Student received Two C's and two F's in his Seventh Grade academic subjects (P106). The only teacher of a Seventh Grade academic subject to testify at the hearing was [REDACTED]. The other teachers' impressions of Student were relayed by [REDACTED] the school psychologist through his general impressions of the various meetings to address Student's needs.

20. At the hearing, [REDACTED] did not relay specific conversations with the other teachers and [REDACTED]. Rather, [REDACTED] conveyed his inferences and general topics from what the teachers told him to at various meetings.

21. As part of his private tutoring at [REDACTED] administered the California Achievement Test ("CAT") wherein Student scored far below grade level in reading and math (P252-255).

22. Student's report cards since First Grade showed that Student was easily distracted; off task; and had other problems with executive functioning (P91, P93, P95, P97, P100-102, P105-106). Student does much better when a teacher guides his tasks, and a lack of effort was not a hallmark of his academic career when he was guided (7/19-Tr. 45).

23. Student's grades did tick up shortly before or shortly after the 504 Accommodation Plan was put in place in the second semester of Sixth Grade (P101, P103). However, Student's grades then again plummeted in the second quarter of Seventh Grade (P105-106).

Teacher Reaction to Student's 504 Plan and Other Accommodations

24. In Sixth Grade, Student's Mother had to contact the District's principal because many of Student's teachers refused to implement the 504 Plan (7/22-Tr. 134-135). Student's mother also testified that Student was not allowed to attend summer school between Sixth and Seventh Grade (7/22-Tr. 136).

25. In October, 2008, Student's Mother testified that [REDACTED] stated that she was "sick of redirecting" Student and ignored Student in her class (7/22- Tr. 132-133). Student's teachers, have refused to aid in helping Student organize his assignments at the end of the day (6/24-Tr.107-109; 7/22-Tr. 151; 7/16-Tr. 180). The District claims to have assigned a counselor to help organize Student's days, but that counselor abandoned her responsibilities in that regard (7/16-Tr. 181). The District's counselor testified that she had a very small role in the 504 Plan and was limited to checking Student's assignment book and communicating with the Student's parents (6/24-Tr. 152-155, 159). The District's counselor was unaware as to whether Student maintained his assignment book after the first week the assignment book was used (6/24-Tr. 151). In actuality, the assignment notebook was not used throughout the school year (7/22-Tr. 181). Student's Mother also testified that Student's teachers, [REDACTED] and [REDACTED] told her that they had too many students to accommodate Student (7/22-Tr. 154-155); and generally refused to accommodate Student (7/22-Tr. 175-178). This testimony was uncontradicted at the hearing and was partially corroborated by [REDACTED] and [REDACTED] (with the partial exception of [REDACTED] science class).

26. The District's school psychologist, [REDACTED] admitted that District personnel did not properly carry out some of the accommodations in the 504 Plan (7/16-Tr. 180-181).

27. [REDACTED] testified that having someone work with Student to organize his day is an important factor in allowing Student to achieve in school and learn to be a responsible student (7/16-Tr. 55-57). Having someone help Student organize his day is an important accommodation which Student needs (7/16-Tr. 56). Student's need for aid in organizing is a result of Student's disability, not to excuse irresponsibility on Student's part (*Id.*)

28. [REDACTED] testified that [REDACTED] does not meet Student's educational needs because he easily understands the concepts and was bored in class (6/24-Tr. 94-95). [REDACTED] and Student's Mother both testified that [REDACTED] admitted she doesn't pay attention to Student and does not like to redirect Student in class (6/19-Tr. 202).

29. [REDACTED] testified that the 504 Plan has had no effect (6/19-Tr. 213).

Student's History of Emotional Issues in School

30. All District personnel testified that Student does not exhibit psychological or emotional issues in school which would suggest that Student's emotional issues affect his ability to learn and be educated in an academic setting (6/19- Tr. 27-28, 155-157; 6/24-Tr. 47, 94,146-150; 7/19-Tr. 41-44). At the domain meeting, discussion was primarily about Student's emotional issues at home (6/25-Tr. 106-107).

31. Student's Mother testified that, at home, Student demonstrates symptoms of depression and anxiety and has no friendships (7/22-Tr. 144-145). At home, Student must be supervised because he is unable to carry out ordinary activities because of his impulsiveness (*Id.* at 147). Student is currently seeing a psychiatrist and is taking Paxil (*Id.* at 148-149).

The Domain Meeting and The Decisions not to Conduct a Social-Emotional Evaluation and not to Conduct an Occupational Therapy Evaluation and not to Conduct an Assitive Technology Evaluation

32. On October 3, 2008, Student's Mother requested a special education evaluation (J053). On December 4, 2008, a domain meeting occurred to determine Student's suspected areas of disability and Student's Mother consented to the evaluation (J047). On February 19, 2009, the District denied Student's request for special education eligibility (J087).

33. At the domain meeting, Student's academic achievement and cognitive status were set out as the suspected areas of disability (J047).

34. [REDACTED], the school psychologist conducted an investigation and determined that social and emotional issues; assistive technology and occupational therapy issues were not issues where Student had a suspected disability because: (1) emotional issues did not arise in the classroom environment; and (2) his handwriting issues and processing speed were not serious enough to warrant an evaluation (7/16-Tr.22-23).

35. At the domain meeting, [REDACTED] interviewed Student's Mother regarding emotional issues, and she agreed that Student did not have emotional issues severe enough to fit the District's definition of eligibility for ED (7/16-Tr. 39-41; 7/22-Tr. 184).

36. After receiving [REDACTED] report, the District offered to do a social-emotional evaluation, but that did not occur because of the litigation positions of the parties.

The Medical Evaluation

37. The medical evaluation noted ADHD as Student's only health problem (J096).

The Psychological Evaluation

38. The District accepted that Student had ADHD, and the purpose of the psychological evaluation was to determine whether the ADHD sufficiently affected Student's ability to learn (7/16-Tr. 38).

39. The District uses the "severe discrepancy method" to determine whether students have a specific learning disability. The severe discrepancy method compares cognitive ability with academic achievement.

40. Student's teachers reported that Student was overwhelmed in the classroom (7/16-Tr. 25). Student's teachers reported that Student was off-tasking and that his focus was distracted (7/16-Tr.-27, 38-39).

41. [REDACTED] also observed Student and discerned no severe emotional issues which would lead to a finding of eligibility for ED (7/16-Tr. 48-49). [REDACTED] did not observe any symptoms of Student which suggested ADHD affected Student in the classroom, but [REDACTED] believed the observations of teachers who saw Student on a daily basis should be given weight over [REDACTED] observations (7/17-Tr. 53).

42. From his observations [REDACTED] noted that part of Student's problems stem from his lack of conscious effort, and that Student has to be taught responsibility in a different way in light of Student's ADHD (7/17-Tr. 53-56). Student would benefit greatly from an adult who helps him to organize his day (7/17-Tr. 56-57). The District acknowledges Student's organizational needs (7/17-Tr. 59).

43. [REDACTED] also had the Woodcock-Johnson test administered to test for Student's level of academic achievement and cognitive abilities (J097-J099, 7/17-Tr. 60). The test showed Student has an extremely low score in the area of processing and working memory (J099, 7/17-Tr. 63-65). However, there was not a large enough discrepancy between Student's cognitive potential and academic achievement to qualify for a learning disability under the severe discrepancy model (7/17-Tr. 64-65). On the day the Student took the Woodcock-Johnson, Student exhibited good effort and concentration 7/17-Tr. 65).

The The IEP Team's Ultimate Finding

i. The Decision Not To Find Student Eligible under Specific Learning Disability.

44. The severe discrepancy model is a method for determining whether a student has a learning disability by comparing the student's cognitive potential with academic achievement.

45. In the present case, Student was found not to have a learning disability because there was not enough of a discrepancy between his cognitive potential and academic achievement (J102, 7/16-Tr. 64-65).

ii. The Decision Not To Find Student Eligible under Emotional Disturbance

46. Because Student's emotional issues did not manifest themselves in the classroom, Student was not found eligible for special education under the disability term ED (ED was eliminated from consideration as a disability term at the domain meeting stage)(7/19-Tr. 41-44).

iii. The Decision Not To Find Student Eligible under Other Health Impaired.

47. The District also has a policy that in order to be eligible under the disability term, OHI for ADHD, Student must also qualify under the severe discrepancy method under the same standards as for a Specific Learning Disability (D053). Thus, a student with ADHD cannot qualify under the disability term OHI unless the student also qualifies for a learning disability (D053).

48. In the present case, one of the two factors which prevented Student from qualifying under an OHI designation was that he did not also qualify for a specific learning disability under the severe discrepancy method (J104, 6/25-Tr. 116).

49. The District also requires evidence of deficits in educational performance that are linked to the health impairment that persist in spite of intervention (J104). [REDACTED] testified that Student was able to pass some of his classes and that [REDACTED] would have expected to see impacts across the board rather if Student's ADHD affected his educational performance (7/16-Tr. 71-72).

50. [REDACTED] the district's educational diagnostician is a certified special education teacher who has evaluated hundreds of students (6/25-Tr. 70-72). [REDACTED] has been the educational diagnostician for 23 years (6/25-Tr. 70). [REDACTED] testified as to the validity of the Woodcock-Johnson and the propriety of its administration in regard to Student (6/25-Tr. 95-96). [REDACTED] admitted that the severe discrepancy model does not test for problems with executive functioning; impulsivity; attentiveness; or organization issues (6/25-Tr. 121-122).

51. The District issued a report of its evaluation finding Student ineligible for OHI (J80-110). The report mentioned one observation of Student in the classroom (that he was turning in his science homework more often), and only contained one other line of discussion regarding Student's performance in school (J089, J097).

52. [REDACTED] was one of Student's expert witnesses at the hearing. [REDACTED] testified that it was improper for the school district to use the severe discrepancy method for ruling in or out whether Student is eligible for special education ADHD impacted Student in the classroom (6/25-Tr. 186-191). The severe discrepancy model does not test for deficiencies in executive functioning, organizational skills, impulsivity, inattentiveness, distractibility, and working memory (6/25-Tr. 186-191).

53. In addition, both [REDACTED] and [REDACTED] testified that relying upon a single test in unfamiliar surroundings can lead to "the doctor's office effect," wherein students with ADHD don't display symptoms of lack of focus or distractibility in highly structured or unfamiliar settings (6/25-Tr. 189-191; 7/16-Tr.67).

54. The District has no way to differentiate how much of Student's academic achievement level is a result of private tutoring and how much is a result of classroom

experience obtained from the school district (7/16- Tr. 33). [REDACTED] and [REDACTED] agreed that [REDACTED] provides a good supplement for Student and aids in Student's learning (6/25-Tr. 196, 198). [REDACTED] works on a model where it tutors students in basic skills and works forward and does not advance until the basic skills are met (7/16-Tr. 31).

Student's Disability(ies) as Described by Student's Expert Witnesses and the District Responses

55. [REDACTED] testified for Student. [REDACTED] is a certified school psychologist who has been hired by school districts and parents to evaluate students (6/25-Tr. 160-162). [REDACTED] is on the state approved list of independent evaluators (*Id.* At 161). [REDACTED] has conducted nearly 5000 evaluations of students, many with ADD/ADHD and social/emotional issues (*Id.* At 162). [REDACTED] has a bachelor's degree in education and a master's degree in school psychology and a doctorate in educational psychology (*Id.* At 163). He has been employed as a school psychologist with an Illinois school district (*Id.*). [REDACTED] evaluated Student and prepared a report regarding Student's eligibility for special education (J146-190).

56. [REDACTED] testified on behalf of Student. [REDACTED] is a licensed clinical social worker and has been one for 18 years (6/19-Tr. 181). He has licenses from the state of Illinois, ACSW accreditation from a national association of social workers, diplomat status through the association of social workers (*Id.* at 181-182). [REDACTED] has a master's degree in social work (*Id.*). His experience is primarily work with children, adolescence, and families (*Id.* at 183). [REDACTED] has seen Student in counseling sessions over 50 times (*Id.* at 189).

57. In addition to ADHD, [REDACTED] also diagnosed Student as depressed (6/19-Tr. 190).

58. [REDACTED] testified on behalf of the District. [REDACTED] has been a school psychologist for 24 years at the [REDACTED] and had worked at other schools prior to that (7/16-Tr.10). He has a certificate in school psychology and works with ED populations (*Id.* at 11). [REDACTED] evaluated Student (*Id.* at 14).

59. [REDACTED] testified that the District requires a finding of loss of academic achievement by students with ADD/ADHD as measured by the severe discrepancy method (7/16-Tr. 14-15).

60. [REDACTED] testing revealed a severe discrepancy between cognitive ability and achievement (6/25-Tr. 183). [REDACTED] testified that the discrepancy may not indicate a learning disability and requires further testing (7/16-Tr. 107-108).

61. [REDACTED] uses a process called "child study" wherein he administers a large number of tests to get a full picture of why a student is not succeeding in school (6/25-Tr. 167). [REDACTED] or his office staff took a family history; administered behavior rating scales to obtain parent and teacher impressions of Student; administered the WISC IV; the Gray Oral Reading Inventory; the Woodcock-Johnson Test of Cognitive Abilities; the

Vineland Scale of Adaptive Behavior; several ADD/ADHD tests, a bipolar questionnaire (*Id.* At 168-171,179, 181, 204-205, 210, 212, 215). The child study method uses the same set of tests regardless of the student's known or suspected disabilities.

62. █████ found Student had ADHD (combined), depression, bipolar disorder, overanxious order of adolescence; oppositional defiant disorder, learning disability in written language and reading comprehension (J189). █████ found Student was borderline in spatial, visual nonverbal measures (6/25-Tr.179). █████ noted that Student had short term working memory problems (*Id.* At 191). █████ found writing expression and writing fluency discrepant with Student's cognitive ability (*Id.* At 192). Student's biggest problem is with processing information (*Id.*). Student does not integrate information visually as well as nondisabled students (*Id.* at 194). Student also has problems with oral reading abilities (J162). █████ agrees that Student has problems with his ability to process and manipulate information backward and forward and in the area of memory (7/16-Tr. 112, 116). █████ disagrees that Student has a learning disability as his scores for academic achievement are in the average range which match Student's intellectual ability (7/16-Tr. 114-115, 118).

63. █████ testified that processing difficulties do not qualify a student as having a learning disability (7/16-Tr. 118). Moreover, District policies forbid a finding of qualification for special education for OHI for processing difficulties alone (7/16-Tr. 118). █████ agreed that Student has great difficulty maintaining attention and concentrating as a result of his ADHD (*Id.* at 196-197). █████ opined that in working memory, Student is at 2.1 grade level; he is retarded when it comes to remembering words; Student is at fourth grade level in reading because of difficulties in holding on to information (6/19-Tr. 197-198). Student has a problem with working with information and problem solving which affects his organizational skills, and that these problems are manifestations of Student's disability (*Id.* at 199). █████ testified that Student is eligible under the disability term OHI (*Id.* at 217).

64. █████ admitted, that school psychologists diagnose students under the eligibility determinations of IDEA while a clinical psychologist diagnoses patients under the criteria of the DSM-IV (6/25- Tr. 183-184). █████ further admitted that he could barely substantiate enough of a discrepancy to justify a specific learning disability under IDEA in Student's case, and that Student most likely has a "learning disorder, not otherwise specified" (*Id.* At 184-185, 256, 259-260). █████ opined that this type of learning disorder is properly classified under the IDEA term OHI (*Id.* At 185).

65. █████ testified that, due to Student's executive functioning problems, the accommodations in the 504 Plan are not sufficient for Student to learn (6/19-Tr. 200). Executive functioning is a person's ability to eliminate distractions and put information into working and short term memory (*Id.*).

66. █████ disagrees with DFC's findings of depression and bipolar disorder (7/16-Tr. 85-86). █████ testified that Student was too young to be administered the MMPI-A and that the internal validity scales indicate that the findings were unreliable (*Id.* at 90-91, 101-

102). Similarly, the [REDACTED] findings were unreliable (*Id.* at 92). [REDACTED] testified that [REDACTED] reports always noted the negative and not the positive aspects of the raw test results (*Id.* at 94-95). The positive aspects of the test results suggest Student does not have emotional problems severe enough to rise to being classified as ED (*Id.* at 95). [REDACTED] further testified that there was so much variability within the subtests for the Vineland assessment, that the results should be reviewed with great caution (*Id.* at 94-95). [REDACTED] also expressed concerns and reservations that Student is eligible under the disability term ED (6/19-Tr. 217-218).

67. [REDACTED] also testified that some of [REDACTED] test instruments were not age appropriate for Student (7/16-Tr. 98).

68. [REDACTED] further testified that [REDACTED] reported results on the BASC and the Demo Drop-out Scale was simply wrong (7/16-Tr. 100). Moreover, [REDACTED] did not report the results of many tests he did administer (7/16-Tr. 101, 105). [REDACTED] testified that [REDACTED] could not properly determine the test results because [REDACTED] did not actually administer the tests (7/16-Tr. 103).

69. [REDACTED] opined that [REDACTED] tutoring would affect Student's academic ability because [REDACTED] develops academic skill development—which is what academic achievement tests measure (6/25-Tr. 198). [REDACTED] opined that students accumulate academic knowledge from school learning, which tutoring can support, but tutoring cannot erase a severe deficit in academic achievement (7/16-Tr. 32-33). [REDACTED] testified on behalf of Student. [REDACTED] is a manager for [REDACTED] who has had experience with special education eligible children (7/22-Tr. 225-226). [REDACTED] works with students on basic skills in reading, math, writing, and study skills (*Id.*). [REDACTED] also attended a meeting with the staff wherein Student's eligibility for special education was discussed (*Id.* at 251). [REDACTED] stated that, at that meeting, [REDACTED] stated that the tutoring at [REDACTED] caused the increases in academic performance which prevented Student from being eligible for special education under district standards (*Id.*). [REDACTED] testified that [REDACTED] can help ADHD students because the low student-teacher ratio allows for frequent redirection (*Id.* at 252-254).

70. [REDACTED] also opined that [REDACTED] social work counseling helped Student with his emotional issues allowing Student to achieve in class (6/25-Tr. 199).

71. [REDACTED] opined that Student internalizes his depression and is thus not acting out in school, but that this internalized depression is affecting Student's ability to learn (6/25-Tr. 208-209). [REDACTED] opined that the fact that Student is failing in school is enough to suspect a disability in ED (6/25-Tr. 219-220). [REDACTED] opined that, as a result of the tests he conducted, Student meets the definition of ED under IDEA (6/25-Tr. 259). [REDACTED] testified that although Student is frustrated with his academic performance, Student's affect and behaviors do not indicate depression (7/16-Tr. 43-45).

72. [REDACTED] also disagreed with the District and opined that Student has deficits in performance in the classroom linked to his disabilities (6/25-Tr. 257).

73. ██████ testified that an occupational therapy evaluation should have been done because of visual motor integration (“VMI”) issues and in order to aid Student in executive functioning problems (6/25-Tr. 202, J164, J190). The results of the ██████ VMI tests indicate Student has problems with visual motor integration (J164). ██████ noted in his observations of Student that Student failed to take notes in class while other students were doing so until a direct intervention from the teacher (D057). Student’s 504 Plan noted that one of Student’s problems was slow handwriting stemming from processing problems (J037). ██████ claimed that the handwriting problems were so minor so as to not warrant a possible occupational therapy or assistive technology evaluation, but the District documentation regarding the evaluation does not demonstrate that this area of suspected disability was ever considered (in either evaluation data or ██████ observation notes). ██████ admitted that fine motor concerns would be difficult to observe from a distance during the observation (7/16-Tr. 52). ██████ also administered a battery of standardized tests, one of which indicated Student had fine motor skills problems (7/22-Tr. 242). ██████ admitted Student’s handwriting is slow in her class.

74. ██████ opined that the evaluation done by the District was not comprehensive in that it did not include a family history, extensive observations and recommendations regarding Student’s behavior in the classroom, medical history and current health status, interviews with parents; and used the Woodcock-Johnson as a test of cognitive ability which was improper (6/25-Tr. 235-237). ██████ also opined that slow handwriting should cause the District to suspect visual motor integration issues, and that the 504 plan shows the District was aware of this (6/25-Tr. 242-244). ██████ admitted Student may need assistance with notes being taken as Student writes more slowly than other students (7/19-Tr. 26-27). ██████ testified that ██████ was thinking of a prior iteration of the Woodcock-Johnson in his criticism of the test, and the current Woodcock-Johnson properly measures cognitive ability (7/16-Tr. 61-62).

75. ██████ office conducted nine test instruments at one sitting (6/25-Tr. 266).

76. ██████ did not observe Student in a school setting and did not directly interview Student’s teachers (6/25-Tr. 263, 274). ██████ does not personally administer the tests (*Id.* at 264).

77. ██████ testified that Student’s social and emotional needs had to be addressed in order for remedial education to be effective (6/19-Tr. 211-212).

Student’s Parent’s Efforts to Remedy Student’s Disabilities

78. In Summer, 2008, Student’s Mother contacted ██████ and enrolled Student for tutoring at ██████ tutoring (7/22-Tr. 136). The ██████ tutoring cost Student’s Mother approximately \$8,800.00 (P235-236).

79. In 2006, Student’s Mother began paying for counseling with ██████ for Student to treat Student’s emotional issues (7/22-Tr. 138). The actions which triggered Student’s

Mother's decision was Student's behavior at home (7/22-Tr. 138-139, 219-220). Student's Mother also retained [REDACTED] to do an independent evaluation which cost \$6,805.00. [REDACTED] the District's Assistant Superintendent for Special Education testified that she had never seen an evaluation bill higher than \$6000.00 (6/25-Tr. 17).

Opinions as To Student's Needs to Bring Him Up to Grade Level

80. [REDACTED] opined that summer school should be attempted in order to bring Student up to grade level (6/25-Tr. 248-250).

Inferences Drawn from the Facts Received at Hearing and Credibility Findings

***i.* The Medical Evaluation**

81. We draw the inference that any failings in the medical evaluation constituted harmless procedural errors in that the medical evaluation identified Student's only disability which the District should have known about and which affected Student in school-ADHD.

***ii.* The Decision Not to Conduct a Social-Emotional Evaluation**

82. We make a credibility finding that Student's emotional issues, if any, did not manifest in the school environment to an extent necessary to alert school personnel that Student might be suspected of being ED. We base our credibility finding on the testimony of school district personnel regarding Student's affect and mood in the school environment; and the lack of Parent witnesses who could testify as to Student's affect and mood in the school environment. See Facts #30.

***iii.* The Psychological Evaluation**

83. We make a credibility finding that the District relied solely upon the severe discrepancy method to disqualify Student from eligibility under the disability terms for OHI and SLD. We base this finding on the following facts: (1) the District's policy which completely bars students from being eligible for special education under either OHI or SLD if unless a severe discrepancy is found; (2) the lack of any discussion of classroom observations in the final eligibility determination for academic performance; (3) the lack of any discussion of any norm based or curriculum based assessment in the academic performance section except for the Woodcock-Johnson results; (4) the lack of any discussion of any grades in the academic performance section except for one sentence regarding science class. We make a credibility finding against RL that grades or previous assessments were considered in the eligibility determination. We base our credibility finding upon the eligibility documentation which is devoid of records of any such deliberations. See J087-J110.

84. We make the inference that using the severe discrepancy method to conclusively prohibit eligibility for students with ADHD under the disability term OHI is not a valid use of the assessment method. We specifically reject the rationale for the severe discrepancy method's use in regard to eligibility under OHI for students with ADHD—namely that the lack of a severe discrepancy demonstrates that ADHD does not affect learning in the classroom.

85. We make the inference that using the severe discrepancy method to conclusively prohibit eligibility for students with ADHD under the disability term OHI does not constitute an individual evaluation of the Student because the method does not take into account the Student's unique academic history and pattern of strengths and weaknesses.

86. We make the inference that using the severe discrepancy method to conclusively prohibit eligibility for students with ADHD under the disability term OHI does not constitute the use of an assessment most likely to yield accurate information on a student's development and functioning in the classroom.

87. We make the inference that using the severe discrepancy method to conclusively prohibit eligibility for students with ADHD under the disability term OHI does not consider the present unique needs of the child.

88. We base the inferences in Paragraphs 84-88 on the following: (1) academic achievement can be augmented by private tutoring and other augmentation; (2) the severe discrepancy method does not test for disabilities which often appear in the classroom such as deficits in executive functioning; inattentiveness, distractibility, working memory, impulsivity, and processing disabilities; (3) the severe discrepancy method may not measure a student's performance in the classroom due to the doctor's office effect; (4) the severe discrepancy method does not take into account the erratic nature of ADHD's manifestations; and (5) the admissions of [REDACTED] that the severe discrepancy method does not test for manifestations of disability in the classroom associated with ADHD. See Facts, #50, 53, 54, 55, 69. We further make a credibility finding in favor of [REDACTED] and [REDACTED] that tutoring can significantly increase academic achievement and we make a credibility finding in favor of [REDACTED] that [REDACTED] admitted as such at the eligibility determination meeting.

89. We make the inference that the failure to further test for a SLD was a harmless procedural error because the further testing would not have conclusively demonstrated that Student is eligible under the disability term SLD. We base this inference on the exhaustive testing of [REDACTED] and his inability to conclusively state that Student is eligible under the disability term of SLD. See Facts, #64.

iv. The Decision not to Conduct an Occupational Therapy Evaluation and Decision not to Conduct an Assistive Technology Evaluation

90. We make the inference that the District should have suspected disability(ies) associated with Student's motor skills. We base this inference on: (1) Student had

identified needs regarding handwriting in his 504 plan; (2) [REDACTED] and [REDACTED] tested Student and found serious deficiencies with visual motor integration and fine motor skills. These deficiencies should have been noticed in the classroom by the teachers- and [REDACTED] noted Student's handwriting was slow; (3) [REDACTED] admitted that he would have difficulty determining fine motor problems through his limited observations; (4) [REDACTED] admitted that visual motor integration problems and fine motor problems can be associated with ADHD. See Facts, #73.

91. We draw an adverse inference from the fact that all of Student's other teachers of regular Seventh Grade classes did not testify that they would have noted handwriting problems and motor problems.

92. We make a credibility finding against [REDACTED] regarding the seriousness of Student's disabilities associated with motor skills. We specifically make a credibility finding that Student has and had serious disabilities associated with motor skills in the classroom. We base this credibility finding on the fact that [REDACTED] and [REDACTED] testing showed that Student had serious problems with visual motor integration and fine motor skills. See Facts, #73.

v. The Cost of the Evaluation

93. We make the inference that [REDACTED] overly comprehensive evaluation goes beyond what is required by IDEA, and that the District should only be required to pay for an independent evaluation defined by the parameter in IDEA. We further make the inference Student's Mother had no say in the type of evaluation or understanding as to what evaluation assessments would be needed, and therefore, equity requires that she be awarded the upper level of reasonableness for evaluations, which by the District's admission is \$6,000.00.

The IEP Team's Ultimate Finding

i. The Decision Not To Find Student Eligible under Specific Learning Disability.

94. We make a credibility finding against [REDACTED] and in favor of [REDACTED] that Student is not eligible under the disability term SLD. We base this credibility finding on [REDACTED] admissions that his testing was inconclusive as to whether Student has a specific learning disability as defined by IDEA. See Facts #64.

ii. The Decision Not To Find Student Eligible under Emotional Disturbance

95. We make a credibility finding in favor of [REDACTED] and against [REDACTED] that the results from the MMPI and Millon assessments for emotional disability were unreliable as shown by internal validity scales; that [REDACTED] failed to highlight positive aspects of Student's emotional health; that the Vineland scores were so variable so as to be

unreliable. We make a credibility finding in favor of [REDACTED] and against [REDACTED] that the tests for emotional health would have yielded more informative results if [REDACTED] had administered them himself. We base these credibility findings on the lack of evidence to the contrary. See Facts #66-68, 76.

96. We make a credibility finding that Student's emotional issues, if any, did not manifest in the school environment to an extent necessary to be classified as ED. We base our credibility finding on the undisputed testimony of school district personnel regarding Student's affect and mood in the school environment; [REDACTED] opinion that Student emotional issues do not manifest in school to an extent necessary to classify Student as ED; [REDACTED] testimony that he has reservations classifying Student ED; and our credibility finding against the assessment results of [REDACTED]. See Facts #30, 66, 95.

iii. The Decision Not To Find Student Eligible under Other Health Impaired.

97. We draw an inference that Student is not progressing academically to the extent necessary to provide him with FAPE. We base this inference on the norm based assessments and criterion based assessments which overwhelmingly show that Student is losing ground relative to his peers. See Facts ##8, 12-13, 15-17, 21.

98. We draw an inference that Student is not at grade level in core academic subjects and that Student is not keeping up with his classmates. We base this inference on the numerous norm based assessments and curriculum based assessments that Student is not at grade level in any subject; testimony of teachers that Student is not at grade level in reading; [REDACTED] opinions; and the fact that Student is failing most academic classes at his grade level. We specifically reject the few tests which show Student at or near grade level because of the overwhelming evidence to the contrary and because the doctor's office effect associated with ADHD causes testing in unfamiliar settings to misrepresent Student's actual abilities in the classroom. See Facts #8, 12-22, 63.

99. We draw an inference that the severe discrepancy method does not properly demonstrate the effect of Student's ADHD in the classroom for the reasons set forth in paragraph #88 above.

100. We draw an inference that Student has difficulty learning on a consistent basis due to his ADHD. We base our inference on [REDACTED] and [REDACTED] testing showing Student's problems with processing; testimony regarding Student's impulsivity, executive function problems; inattentiveness; need to be redirected; organizational problems; Student's performance on norm based assessments and criterion based assessments; Student's

¹ Our finding in this regard does not mean that Student has no social and emotional issues which affect his learning environment—merely that Student does not have severe enough emotional issues to qualify under ED. Therefore, the District should conduct a social-emotional evaluation of Student as described below to determine whether Student needs social and emotional related services to obtain an educational benefit from his education at the District.

failing grades; and Student's motor skill problems. We do not believe [REDACTED] and Student's D's in science reflect his academic achievement level because [REDACTED] and [REDACTED] are remedial classes; and we make a credibility finding that [REDACTED] science grades do not solely reflect academic progress. We base this credibility finding on [REDACTED] testimony as to the meaning of her grades, notably awarding an A+ for simply turning work in regardless of quality. We also can draw no inference from social studies grades because there was no testimony as to the meaning of those grades ([REDACTED] did not testify at the hearing).

101. We draw an inference that Student's behaviors are not voluntary and are a result of his disability. We base this inference on the opinions of [REDACTED] and [REDACTED] describing the effects of ADHD; the observations of Student's teachers, especially [REDACTED] testimony that Student tried very hard on a test which showed he was far below standards; and the assessments which show Student has serious disabilities related to processing information; Student's consistent inability to perform to standards on norm based and curriculum based exams across a wide number of test administrators.

102. We draw an inference that Student's educational deficits in the classroom are a result to a great extent of his ADHD and processing disabilities and the limited alertness that is a symptom of ADHD. We base this inference on the testimony of [REDACTED] and [REDACTED], the assessments which show Student has serious disabilities related to processing information; [REDACTED] testimony that Student tried very hard on a test which showed he was far below standards; teacher observations which match the traditional symptoms of ADHD; and Student's motor skill problems which resemble traditional symptoms of ADHD.

103. We draw an adverse inference that Student's teachers who did not testify would testify to the inferences and facts set out in Paragraphs 97 to 102.

iv. The Effect of Accommodations on Student's Eligibility

104. We draw an inference that teachers are unable to accommodate Student in a regular curriculum to an extent necessary for him to achieve academically due to the teachers' other responsibilities to the rest of the class. We base this inference on the testimony of [REDACTED] that the 504 Plan wasn't followed; the testimony of [REDACTED] that student couldn't be accommodated in organizational matters; the testimony of [REDACTED] that [REDACTED] does not meet Student's educational needs; Student's Mother and [REDACTED] testimony regarding teacher hostility toward accommodations; [REDACTED] testimony that the 504 Plan had no effect; and the number of students and responsibilities of the teachers as stated by [REDACTED]

Student's Parents Efforts to Remedy Student's Disabilities

105. We make a credibility finding that Student's Mother spent the entire Sallie Mae loan on tutoring, and that the tutoring aided Student from falling further behind.

106. We make an inference that [REDACTED] counseling is necessary primarily for Student's emotional problems which manifest at home. We base this inference on the testimony of School personnel that Student does not manifest emotional problems at school.

IV. Conclusions of Law

Burden of Proof and The Authority of The Hearing Officer

107. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* ("IDEA") and Article 14 of the Illinois School Code, 105 ILCS 5/14-8.02a. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Thus, compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

108. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). In this case, the School District filed the due process complaint, and therefore, the ultimate burden is on the School District in regard to its complaint. The School District must prove its case by a preponderance of the evidence.

109. In determining whether an evaluation is proper under IDEA and the School Code, the hearing officer does not need to defer to the school district witnesses. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002)(like Wisconsin ALJ's, Illinois Impartial Due Process Hearing Officers are presumed to be experts on special education law, see 105 ILCS 5/14-8.02c); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

110. Under federal administrative law, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7th Cir. 2001). Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7th Cir. 2005).

Moreover, hearing officers can make reasonable inferences from the evidence adduced at trial. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Inferences must also be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support our

inferences and conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart, supra*.

Similarly, to the extent we rely upon expert opinions, the expert opinions must be inferred ultimately from facts in the record. *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7th Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

Illinois law imposes an even more stringent standard on administrative hearings. In addition to the substantial evidence standard, Illinois law requires that administrative decisions be supported by "competent evidence." Competent evidence is either: (1) evidence which would be admissible in a trial; or (2) inadmissible evidence of such a character which responsible persons are accustomed to rely upon said evidence in serious affairs (which we can only rely upon if admissible evidence is unavailable). *Starkey v. Civil Service Commission of the State of Illinois*, 105 Ill.App.3d 904, 910 (1st Dist. 1983) *rev'd on other grounds* 97 Ill.2d 91(1983).

111. Illinois law also requires the trier-of- fact in administrative adjudications to accept uncontradicted factual testimony as true. *Crabtree v. Illinois Department of Agriculture, Division of Agricultural Industry Regulation*, 128 Ill.2d 510, 518 (1989). Thus, for us to disregard factual testimony, it must be contradicted by positive testimony or circumstances, the witness proffering the testimony must be impeached, or the testimony must be inherently improbable. *Bucktown Partners v. Johnson*, 119 Ill.App.3d 346, 351 (1st Dist. 1983).

112. In general, the trier-of-fact is entitled to draw an adverse inference when a witness within the control of the party is not called to testify without excuse. See e.g. Illinois Civil Pattern Jury Instruction 5.01.

Standards for Determining Whether the District Complied with the Law in Evaluating the Student

113. The District has the responsibility to conduct a full and individual initial evaluation in accordance with pertinent regulations before the provision of special education and related services. 34 CFR 300.301(a). The District has the burden of showing that its evaluation was "appropriate." *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167, 1169 (7th Cir. 1994). An appropriate evaluation is one which complies with the pertinent federal and state regulations. *Krista P. v. Manhattan School District*, 255 F.Supp.2d 873, 887 (N.D.Ill. 2003)(federal and state regulations "provide the minimum requirements for an evaluation").

114. An evaluation must assess a student in all areas related to the suspected disability, 34 CFR 300.304(c)(4); and be sufficiently comprehensive to identify all of the Student's

special education and related services needs, whether or not linked to the disability category(ies) in which the child has been classified. 34 CFR 300.304(c)(6).

The District's evaluation must be "comprehensive" to be appropriate. 34 CFR 300.304(c)(6). This means that the District must evaluate: (1) all areas of disability or suspected disability; (2) to the extent necessary to identify the needs of the child to special education and related services. 34 CFR 300.305(a)(2)(i)(A). As part of determining the nature and extent of the special education services and related services a child needs, the School District must determine the extent of the student's disability. *In Re Yuba City (CA) Unified School District*, 22 IDELR 1148 at 4 (OCR 1995)(in determining whether evaluation under Section 504 complaint was adequate, School District failed to properly evaluate Student by not determining the extent of the disability-Section 504 evaluation standards are essentially the same as evaluation standards under IDEA see e.g. 34 CFR 104.35). The District must determine the cause of Student's behaviors to the extent necessary to classify Student's disability(ies) as defined by IDEA and provide Student with special education and related services. 34 CFR 300.301(c)(2). The District must conduct assessments necessary to allow the IEP Team to properly determine the content of Student's IEP. 34 CFR 300.304(b)(1)(ii), 304(b)(7).

115. In evaluating a student, the district must also consider: (1) the present needs of the child; (2) whether the child needs special education and related services; and (3) whether any modifications or accommodations are required. 34 CFR 300.305(a)(2)(i)(B)(i-iv).

116. During an evaluation, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 CFR 304(b)(1). Moreover, a school district must properly administer tests it does use to evaluate students. 34 CFR 300.304(b)(3),(c)(iii), (c)(iv). The District is not allowed to use any single measure or assessment as the sole criterion for whether a student has a disability. 34 CFR 300.304(b)(2).

In addition, during an evaluation, the District must review existing evaluation data on the child, evaluations and information provided by the parents; current classroom based assessments and classroom based observations; and teacher and service provider observations. 34 CFR 300.305(a)(1)(i-iii). The School District must then determine what additional data, if any, is needed to determine whether: the child has a disability and the needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services and whether additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b).

117. The District must also choose assessments which are selected and administered so as not be discriminatory on a racial or cultural basis. 34 CFR 300.304(c)(1)(i). The assessments must be provided in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer. 34 CFR 300.304(c)(1)(ii),

(c)(3). The assessments must be administered by trained and knowledgeable personnel; used for the purposes for which the assessments are valid; and are administered in accordance with any instructions provided by the producer of the assessments. 34 CFR 300.304(c)(1)(iii-v).

118. The District must administer assessments which assess specific areas of educational need and not merely to provide a single general intelligence quotient. 34 CFR 300.304(c)(2).

119. Although the School District must evaluate properly and according to the OSEP regulations, we are entitled to make a finding against the District only if the procedural inadequacies impeded the Student's right to a free appropriate public education or denied the student some educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III); *Capistrano Unified School District*, 108 LRP 40490 at 29 (Cal. SEA, 2008).

120. A school psychologist is charged with, among other things, consulting with other staff members in planning school programs to meet the needs of children as indicated by assessments. 34 CFR 300.34(c)(10)(iv).

121. The District is responsible for carefully documenting and carefully considering evidence from all sources. 34 CFR 300.307(c)(ii).

Conclusions of Law Associated with the Appropriateness of the Evaluation of Student's Suspected Learning Disability

122. There are additional requirements for evaluating students suspected of having a specific learning disability. 34 CFR 300.307-310. The additional requirements relevant to this case are set out below.

123. The determination of whether a student has a specific learning disability must be made by the child's parents and a team of qualified professionals including the student's regular teachers and a person qualified to conduct individual diagnostic examinations such as a school psychologist. 34 CFR 300.308. The group may determine that the student has a specific learning disability if the student is not achieving adequately; is not making progress in response to research based interventions; or the child exhibits a pattern of strengths and weaknesses which indicate the existence of a specific learning disability. 34 CFR 300.309. The school district must ensure that a student is observed in the learning environment to document academic performance and behavior in the areas of difficulty and use the observed information to determine whether the student has a specific learning disability and the extent of that disability. 34 CFR 300.310.

124. Illinois allows the use of the severe discrepancy model to determine if a student has a specific learning disability. 23 Ill.Admin. Code 226.130(d). The severe discrepancy model determines the existence of a learning disability by determining

whether there is a severe discrepancy between the student's cognitive abilities and the student's academic achievement.

Conclusions of Law Associated with the Decision Not to Conduct an Occupational Therapy Evaluation and Assistive Technology Evaluation

125. Occupational therapy is one of the related services which a school district must provide to students with disability if appropriate. 34 CFR 300.34(a). Occupational therapy includes services which: (1) improve, develop, or restore functions impaired through illness; (2) improve the ability to perform tasks for independent functioning; and (3) using early interventions to prevent further impairment or loss of function. 34 CFR 300.34(c)(6).

Conclusions of Law Associated with the Determination Not to Find Student Eligible for Special Education

126. Section 504 of the Rehabilitation Act requires that the School District provide regular or special education with related accommodations and services regardless of the nature or severity of the disability. *Bonita Unified School District*, 39 IDELR 8 (OCR 2003).

127. On the other hand, IDEA requires that a student not only have a disability as defined by the pertinent regulations, but also that the disability requires that the student needs special education services. 34 CFR 300.8(a)(1). Thus, a student must show that the disability has a significant adverse impact on the student's educational experience. *Loch v. Edwardsville School District No. 7*, 2009 WL 1747897 (7th Cir. 2009, unpublished order)². Specifically, a student must be denied access to a basic floor of opportunity to benefit from the curriculum in the regular classroom before a school district is required to provide special education. *Hood v. Encinitas Union School District*, 486 F.3d 1099, 107 LRP 26108 (9th Cir. 2007). Therefore, as an additional factor to any finding of eligibility under a disability term, we must also find that the Student needs special education services. *See Alvin Independent School District v. AD*, 48 IDELR 240, 503 F.3d 378 (5th Cir. 2007).

128. In making this determination, most courts have held that we must take into account the adequacy of accommodations which the student is receiving in the classroom without special education. *Hood v. Encinitas Union School District*, 486 F.3d 1099, 107 LRP 26108 (9th Cir. 2007). Nothing within IDEA forbids a school district from modifying its regular education curriculum so that a student who would otherwise qualify for special education under IDEA can succeed in a regular classroom. *S.C. v. State of Hawaii Department of Education*, 47 IDELR 65, 107 LRP 4910 (D. Hi. 2007). In such a circumstance, the student who is progressing in the classroom would not be eligible for special education under IDEA. *Id.* However, accommodations privately obtained by the

² Because this is not a federal court, and Seventh Circuit Local Rule only applies to the federal courts of the Seventh Circuit, citing an unpublished order is permissible, although the order admittedly is only persuasive precedent. *See Payne v. Pauley*, 337 F.3d 767 fnote. 6 (7th Cir. 2003).

parents should not be taken into account in determining whether Student is eligible for special education. *N.G. v. District of Columbia*, 50 IDELR 7(D.D.C. 2008) (to hold otherwise would be to deny the student a free appropriate public education (“FAPE”).

129. Some factors which courts and hearing officers use to determine whether a student’s disabilities (including ADHD) necessitate a special education eligibility finding are: (1) whether a student is making academic progress, *Alvin Independent School District v. AD*, 503 F.3d at 384; (2) whether a student is performing at or above grade level, *Hood v. Encinitas Union School District*, 486 F.3d at 1106-1109; (3) whether a student is performing as an average student vis a vis his/her classmates, *Rodirecus L. v. Waukegan School District No. 60*, 90 F.3d 249, 254 (7th Cir. 1996); (4) whether Student has difficulty learning in class on a consistent basis as demonstrated by continued inconsistent grades across an academic career, *Williamson County Board of Education v. C.K.* 52 IDELR 40, 109 LRP 12171 (M.D. Tenn. 2009); (5) whether a student’s behaviors causing failure in school are conscious and have a purpose and desired goal, or alternatively, whether the behaviors are involuntary, *Mars Area School District v. Laurie L.* 39 IDELR 96, 827 A.2d 1249 (Penn. Com. Ct. 2003); and (6) any other aspect of the disability where a student’s education is being significantly impacted by the symptoms or manifestations of the disability.

130. Every child who is advancing from grade to grade is not necessarily making academic progress depending on the situation. *Board of Education, Henrick Hudson Central School District*, 458 U.S. 176, 203, fnote 25 (1982).

131. In regard to students diagnosed with ADHD, the child’s performance and symptoms must be carefully analyzed as some children with ADHD are eligible for special education and some are not. *M.P. v. North East Independent School District*, 49 IDELR 37, 107 LRP 68824 (W.D. Tex. 2007). The analysis is, by necessity, fact-intensive. *Id.*

132. The failure to develop an IEP when a student is eligible for special education constitutes a denial of FAPE and a violation of IDEA. *Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006).

i Eligibility for Other Health Impaired

133. For purposes of this case, in order for a student to be eligible under Other Health Impaired (“OHI”), the student must:(1) have limited vitality or alertness, including heightened alertness with respect to the educational environment. . .due to attention deficit hyperactivity disorder; and (2) the limitation must adversely affect the student’s educational performance. 34 CFR 300.8(c)(9).

ii Eligibility for Specific Learning Disability

134. In order for a student to be eligible under Specific Learning Disability (“SLD”), the student must have a disorder in one or more of the basic psychological processes

involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 CFR 300.8(10).

135. While the DSM IV diagnoses might be helpful to the extent that diagnoses overlap with IDEA disability terms, a DSM IV diagnosis of learning disability does not automatically constitute a diagnosis under IDEA.

iii. Eligibility for Emotional Disturbance

136. In order for a student to be found eligible for special education for Emotional Disturbance (“ED”) a student must exhibit one or more of the following characteristics for a long period of time and to a marked degree that adversely affects a child’s educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a general pervasive mood of unhappiness or depression; or (e) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 CFR 300.8(c)(4).

137. The emotional problems stemming from the claimed disability must bear upon instructional needs and manifest themselves in the school environment in order for a student to be classified ED. *In Re Child with a Disability*, 504 IDELR 297, 504 LRP 7865 (IL SEA 1983).

Conclusions of Law Associated with Student’s Right to Compensatory Education and Reimbursement for Tutoring and Counseling Services

138. Student is entitled to compensation for the Parents’ private efforts to make up for the lack of special education if: (1) the District failed to find Student eligible when it should have; and (2) for the length of time which the District knew or should have known that Student needed special education. *Forest Grove School District v. T.A.*, 557 U.S. ____ (2009).

139. The District is responsible for seeking out and finding all children eligible for special education and related services. 23 Ill.Admin.Code 226.100. There is no basis in law for a district to require a parent to request an IDEA evaluation before undertaking one. *Scott v. District of Columbia*, 46 IDELR 160, (D.D.C. 2006).

Conclusions of Law Associated with Placing Student

140. In general, school districts and parents should make the initial attempt at deciding upon a special education placement. *Menomonie Area School District v. Rachel W.*, 505

IDELR 220 (Wis. SEA 1983). As such, to the extent we find Student eligible for benefits, we will exercise our discretion and consider a claim for the hearing officer to set a placement premature and dismiss that aspect of Parents' Complaint without prejudice. If the parties cannot decide on an agreeable special education placement, then their disagreement can be decided in another due process hearing. The parties during the hearing agreed to this procedure.

Conclusions of Law Associated With the Complaint and Order

141. We can only provide relief set out in the complaint further limited by the issues set out in the prehearing conference. Thus, we can only provide reimbursement for tutoring; summer school; reimbursement for counseling; and reimbursement for travel; reimbursement for independent evaluations; as well as a determination of the propriety of the District's eligibility determination (including the timing of the eligibility finding).

V. Application of Law to Fact

142. We find that the District's evaluation was not appropriate because it did not comply with pertinent regulations in the following ways:

a) The District relied solely on the severe discrepancy method to test for eligibility based upon the disability term OHI. To the extent the District considered other criteria, this was strictly for show as the only assessment that actually mattered was the severe discrepancy method;

b) The District failed to use the severe discrepancy method in a valid way by using it as the only way to assess ADHD's effects on Student's learning. To wit, the District failed to consider the doctor's office effect in using the severe discrepancy method.

c) The District failed to review existing norm based and curriculum based assessments in any meaningful way;

d) The District failed to conduct an individual evaluation by reviewing Student's unique needs, strengths and weaknesses, and failed to take into account private tutoring in measuring Student's academic achievement in the classroom;

e) The District failed to use a test likely to lead to accurate information. To wit, the District used the Severe Discrepancy Method to determine Student's academic achievement in the classroom without taking into account the effect of private tutoring;

f) The District failed to use an assessment likely to lead to accurate information regarding Student's disability. To wit, the severe discrepancy method, which was the only test which mattered in the OHI determination, did not test for executive functioning deficits; problems with impulsivity; organizational problems; processing and working memory problems.

g) The District failed to conduct an occupational therapy or assistive technology assessment even though it knew or should have suspected disabilities associated with fine motor and visual motor integration.

h) The District failed to properly consider evidence from all sources by relying solely on the Severe Discrepancy Method in determining Student's eligibility under OHI.

We find that the district violations of regulations denied Student FAPE as these evaluation violations prevented Student from being deemed eligible and obtaining an IEP. These violations thus denied Student FAPE³.

143. We find the District's evaluation was appropriate in other areas.

144. We find that the District violated IDEA and denied Student FAPE by failing to find him eligible under the disability term of OHI. To wit, we find that manifestations of Student's disabilities (including limited alertness and processing difficulties) affect his education experience with such severity to warrant the need for special education. We find that the Parent did not sustain her burden that Student should be eligible under the disability terms ED or SLD.

145. We find that the District should have evaluated Student at the time the 504 Plan was implemented because, under the District's Child-Find obligations, Student had a suspected disability under IDEA at that time, and this, coupled with Student's terrible norm based and curriculum based assessment scores, should have made the District aware that Student could be eligible for special education. However, given Student's grades at the Sixth Grade (which were much better than in Seventh Grade), we find that Student's Mother did not sustain her burden of proof that Student would have been found eligible for special education until late, 2008 or early, 2009. Therefore, we hold that Student's Mother should equitably only be compensated for half the tutoring services- for tutoring during the time when Student should have been receiving special education.

146. We find that the tutoring aided Student and partially ameliorated his need for special education services. Therefore, we find that Student's Mother should be reimbursed for the cost of tutoring in the amount of \$4,400.00.

147. We find that the District's remaining objections to Student documents are sustained, and the Parent's objections are waived as not presented in the closing arguments.

147. We find there was no evidence of travel expenses and that Student's Mother did not sustain her burden that counseling was necessary to ameliorate the effects of not receiving special education.

148. We find that the request for summer school is moot as summer school is no longer possible in mid-August.

149. We find that Student's Mother is entitled to reimbursement for [REDACTED] independent evaluation in the amount of \$6,000.00. We find that Student's Mother is entitled to reimbursement for an independent occupational therapy assessment due to the District's failure to conduct an occupational therapy assessment as part of the District's original evaluation.

³ Under IDEA, FAPE is the bottom floor of opportunity to obtain educational benefit required by IDEA

150. We find that Student's Mother's request for a placement to be decided at this time is premature, and that due process complaint should be brought only after the IEP Team attempts to put together an IEP with a mutually acceptable placement. Therefore, that aspect of the Student's Mother's complaint is denied without prejudice.

151. We find that, although the Student turned down a social-emotional evaluation, and that, at the time of the initial evaluation, the District had no reasonable basis to suspect Student was eligible for ED, we believe [REDACTED] report demonstrates that there is a possibility that Student has emotional issues which affect him in class and could require provision of social and emotional related services. We use our equitable powers to order the District to conduct such a social-emotional evaluation prior to the IEP meeting to determine Student's placement.

VI. Order

The Student is declared eligible for special education under the disability term, OHI. The District is to conduct a social-emotional evaluation and reimburse Student's Mother for an independent occupational therapy assessment by August 30, 2009. After such assessments have been completed, the District is to convene an IEP meeting by September 10, 2009, to determine Student's special education placement. The District is to reimburse Student's Mother \$4,400.00 for part of the tutoring services and \$6,000.00 for the partial reimbursement of [REDACTED] independent evaluation. The District shall provide proof of compliance to the Illinois State Board of Education, Compliance Division, by October 1, 2009.

VII. Right to Request Clarification

Section 14-8.02(a)(h) of the School Code, allows the hearing officer to retain jurisdiction after the issuance of the decision for the sole purpose of considering a request for clarification. A request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The request shall operate to stay the implementation of those portions of the decision for which clarification is sought. I shall issue a clarification of the specific portion of the decision or issue a partial or full denial of the request in writing within ten days of receipt of the request and mail copies to all parties to whom the decision was mailed.

VIII. Finality of Decision

This decision shall be binding upon all parties.

IX. Right to File Civil Action

Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS

5/14-8.02a(I) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

/S Joseph P. Selbka
Joseph P. Selbka
Impartial Due Process Hearing
Officer

Date:8/13/2009

Joseph P. Selbka
53 W. Jackson, 1118
Chicago, IL 60604
312-788-3310
Fax 312-788-3311
jselbka@sbcglobal.net

CERTIFICATE OF SERVICE


In the Matter of: [REDACTED] vs. [REDACTED]
ISBE Case Number: 2009-0320

The following parties have been served a copy of the Decision and Order.

7004 2510 0001 9376 2151 (two copies)
[REDACTED]

7004 2510 0001 9376 2168 (two copies)
[REDACTED]

7004 2510 0001 9376 2144
Ms. Mary Long
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001



Joseph P. Selbka
The Hearing Officer

8-13-09
Date